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ABSTRACT

Legal problems that colleges and universities might avoid are identified. Colleges are being sued over a broad range of legal issues and are expending money for legal and court fees, settlements, and judgments. Legal problems include right of admission to particular colleges, the right to stay in school, questions of faculty promotion and tenure, and questions of tort liability. School business officers need to inform the college president about matters that might create legal problems and adverse fiscal effects on the institution. The institution might be able to settle at less expense out of court. The best way to avoid employment-related legal problems is to have policies stated in writing and to insure that the institution follows its written policy. Courts require that there be due process, which sometimes varies depending on whether the institution is public, private, or church-affiliated. Business officers should understand the legal elements of a contract and should know when to seek legal advice. In addition, the contract should not present conflicts of interest. Additional concerns are: to make certain that bequests are valid and that the institution is not placed in legal jeopardy; to provide adequate security on campus; and to take action against fraud and dishonesty committed by faculty and school employees. (SW)

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1984 Annual Meeting Presentation

Legal Issues In Higher Education

by WILEY A. BRANTON

There was a time when courts, as a general rule, simply would not look at issues involving churches and religious institutions on the one hand and academic institutions on the other. They are still hesitant, but more and more they are required to do so. Courts are asked to rule on the right of admission to particular colleges or universities, the right of a student to remain in school, and the right to graduate; questions of faculty promotion and tenure; employment policies and contracts of a general nature; and questions of tort liability, either on the part of the institution or on the part of agents or servants of the institution.

The courts are deciding more and more of these matters because either the institutions involved have no rules designed to provide due process, or they fail to follow the rules they do have. In the latter case, any institution will be a certain loser in court. Because these matters often cost institutions great amounts of money, business officers are directly affected by them. Funds lost in court may not come out of the business officer's own budget, but he or she will still have to replace them if the institution is to continue to operate. Money is expended for legal and court fees, settlements, and judgments. Also, settlement of a lawsuit or winning a judgment concerns persons beyond those who brought the litigation. When an individual is able to go to court or to pressure an institution into settling for a larger amount because, for example, of a salary inequity or a refusal to grant tenure or promotion, it is likely that other individuals will soon try to do the same where they feel similarly situated.

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Colleges and universities are being sued over a broad range of legal issues. Traditional issues are breach of contract (relating to employment) and disputes over the furnishing of supplies and services or over construction projects. Then there are new areas that have multiplied in the last 20 years: student rights, admissions, the right to stay in school, student claims of being denied a particular grade, the awarding of degrees, the denial of degrees, situations relating to fraternities and sororities (such as their privileges on campus, their rights to certain housing facilities, and the regulation and control of those facilities), dress codes, required curricula, sports participation, and campus security. More and more, institutions also need to be concerned with the possibility of antitrust litigation. Certain contractual obligations to companies or corporations that are targets of such litigation, could bring an institution in as a participant in the alleged tort.

While overall direction must come from the head of the institution, business officers generally have his or her ear. You should spare no effort in bringing to the president's attention the matters that could have an adverse fiscal effect on the institution or create legal problems. It is important that

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business officers discuss these matters with the president well in advance of legal problems in order to avoid a situation where the institution has to pay out ten times more than it would have had to pay had the problem been addressed at the beginning.

A number of legal matters could be resolved very easily for a small amount of money and before a lawsuit is ever filed if the parties would simply be willing to sit down, listen to the arguments, and come to a reasonable conclusion. The institution might be able to settle for a price that is less than the cost of paying its lawyer to argue in court. Unfortunately, however, many institutions end up going to court and are ready to discuss settlement only at the bitter end, and then generally through the prodding of a trial judge. Of course, at that point, the price will be much higher than it would have been had settlement been reached much earlier.

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Employment Issues

Since most faculty and staff are initially hired on a probationary basis, I would recommend that each prospective employee be required to give a signed statement, prior to being employed, in which he or she spells out any promises or commitments that have been made to him or her beyond the terms of the written contract of employment (this should be done in spite of the fact that most employment contracts state that there are no terms other than those cited in the contract). Often someone will take you to court, saying, in effect, "I did sign the contract, but I was told that at the end of the first year I would be recommended for tenure and would get a promotion even though it might be up to seven years before I actually receive tenure." You then have to go to court to argue the case. However, if you have something in writing from the individual, signed at the time he or she was first employed, you make it difficult for him or her to come up later with an oral representation that was allegedly made to them when they signed the employment contract in the first instance.

The best way to avoid many of these problems is to have the bulk of your policies set forth in writing. Given that personnel policies and practices and grievance procedures *are* in written form at most institutions, why do we have all these serious problems? It is because institutions often do not follow their own written policies. You may be so eager to hire a particular person for your faculty or staff that you are willing to waive all the requirements. In six months or one year, you give glowing evaluation reports. Then one morning the new employee does something that you do not like. You are not only angry with him or her for the day, but you have a way of reaching back to the day they were hired and of making statements to the effect that you have consistently had problems with this individual (notwithstanding the positive evaluation forms that are sitting in the personnel office). When the employee files a grievance, deans and department heads are as eager to shortcut the system to remove the person as they were to get him or her hired in the first place. Procedures are not followed, and the employee is fired. He or she goes to a lawyer, who discovers that the institution has not followed its own procedures. Lawyer and client know they have a lawsuit they can win.

The court might suggest that you go back and follow your procedures. In doing this, you may find for the first time that certain facts and circumstances create legitimate cause for getting rid of the individual. However, now the court does not accept your position because you did not present it at the beginning. Not following your own rules can get you into more trouble than anything else.

Courts will require that there be due process, which sometimes varies depending on whether the institution is public or independent or church-affiliated. The courts care mainly that the process be basically fair and, more importantly, that you follow the regulations that you yourselves have prescribed. Many times it is very easy for an institution to fire someone who is really not pulling his or her weight or who has not fulfilled contractual obligations. You simply need to go through your established procedures and let the appropriate people examine the facts and make a recommendation. This works along the lines of a jury. When a jury makes a finding of fact, it is very rare that a court will overturn that finding, unless the record reveals that there really were no facts available on which the jury could have based its conclusion. Similarly, if there is anything in the record that will support the findings of a grievance committee, the courts generally will accept it if you have followed your own procedures.

"If you find yourself in a difficult legal situation, take a realistic look at all your options and alternatives. Then settle if you must, remembering that it is far better to spend your institution's money in a way that will advance the institution than to pay out endlessly by fighting cases in the courts."

Contracts

Most business offices are also the contract offices, and you should not waive the latter responsibility. If

you get in the habit of rubber-stamping contracts that have for all practical purposes been okayed by a dean or a department head or even by the president, you may find yourself confronted one day with a contract whose terms are outrageous. You may decide to draw the line and decline to sign the contract, but a court may well hold your institution liable because you had signed similar contracts in the past. Business officers should understand the legal elements of a contract and should know when to seek legal advice. You should also make sure that if advice is necessary, you seek it *before* you sign the contract or agree to any modification of it.

You must also be satisfied that the contract presents no conflicts of interest. This is a growing problem that constantly plagues institutions. The Twentieth Century Fund recently published "The Science Business," a special report designed to prevent any conflict of interest between universities and corporations. The report suggests that no institution hold stock in a company that is operated by or for people associated with the institution; that faculty and staff be required to disclose their relationship to companies that do business with the institution; that the signing of documents by unauthorized persons be prohibited; and that the signing of agreements that grant patents or exclusive licenses to a company in which faculty members hold responsible administrative positions or have substantial ownership interest be prohibited. You need to be especially wary of company board membership or special favors given to you as a business or fiscal officer, to the head of your institution, or to certain important members of your governing board, particularly where the companies in question have relationship to you or to others involved with the institution.

"You should spare no effort in bringing to the president's attention the matters that could have an adverse fiscal effect on the institution or create legal problems. It is important that business officers discuss these matters with the president well in advance of legal problems in order to avoid a situation where the institution has to pay out ten times more than it would have had to pay had the problem been addressed at the beginning."

Institutions as Beneficiaries

For a long time institutions paid very little attention to probate law. You simply received a letter from a lawyer on occasion, informing you that your institution had been named as a beneficiary in a will. However, there have been cases in which individuals have had fraudulent wills, and the supposed bequests have created serious legal problems for institutions. Business officers should make certain that all bequests are valid and that the institution is not placed in legal jeopardy.

Security Problems

The area of the law relating to security is expanding. In the past, unless you were in an urban setting, you did not see a law enforcement officer anywhere near the campus except in connection with something like traffic problems resulting from a football game or some special event. Now, however, security is a major concern on most campuses. It is a costly problem and institutions do not seem to know quite how to handle it. There are no fixed standards to follow, but you should be aware that if you are sued, what is going to be uppermost in the minds of the jury is whether the institution did everything it should have done under the circumstances. If you start to receive reports of crime in the area, you must increase your security awareness. It may mean more guards, stronger locks, an escort service, or lights —essentially, whatever is reasonably required.

Fraud

Regarding fraud and dishonesty, institutions need to be more vigilant and may want to consider doing what other victims of crime are now doing: going to court as a plaintiff and bringing suit against dishonest staff, faculty, and other employees and against the companies that they are doing business with, including any banks where checks made out to the institution are being deposited in the names of individuals.

Conclusion

You must keep up with the latest court decisions, and you must continue to follow policies of nondiscrimination, affirmative action, and salary equity. The law is still quite strong on this, notwithstanding certain rather conservative decisions by some courts, including the Supreme Court.

If you find yourself in a difficult legal situation, take a realistic look at all your options and alternatives. Then settle if you must, remembering that it is far better to spend your institution's money in a way that will advance the institution than to pay out endlessly by fighting cases in the courts. ♦

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